IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-5144

EDWARD LEE McNEIL,

Petitioner,

v.

DIRECTOR, PATUXENT INSTITUTION,

Respondent.

PETITIONER'S REPLY BRIEF

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I. The State's Affidavits

At the outset, Petitioner Edward Lee McNeil respectfully requests the Court to disregard and strike as wholly improper and untimely the following matters in Respondent's Brief, filed herein on April 17, 1972: (a) three affidavits executed April 13, 1972, and attached as Appendices A, B, and C to that Brief and (b) each and every portion of Respondent's Brief based on or related to said affidavits, including, but

not limited to, the arguments presented at pages 16-18, 27-28, 32, 65, 72, and 77. While Petitioner's request would normally be presented in the form of a motion to strike, in view of the fact that Respondent's Brief was due and filed only four days prior to oral argument, Petitioner's request to strike has been incorporated in this Reply Brief.

Each of said affidavits was executed April 13, 1972, four days before Respondent's Brief was due to be filed. These obviously untimely and self-serving statements of opinion from the Director and two staff members at Patuxent Institution were never introduced or admitted into evidence in any court proceeding and were never subject to cross-examination or rebuttal. They represent a wholly improper last-minute effort to prop up Respondent's untenable position that it can confine Petitioner for the rest of his life in an institution for defective delinquents without any judicial hearing whatever, notwithstanding the fact that McNeil's criminal sentence has expired. It is particularly shocking that the State would attempt to circumvent the rules of evidence and the rules of this Court by seeking to submit testimony in the guise of "appendices" to its Brief, where virtually identical testimony by Patuxent staff members has been rejected by two trial courts in Maryland when introduced subject to cross-examination and subject to the right to produce conflicting expert testimony. These Maryland trial-court decisions are discussed at pages 24-28 of Petitioner's Brief.[1]

[1] Respondent's use of affidavits introduced for the first time in this Court should be contrasted with the procedure adopted by Petitioner. Since no hearing has ever been accorded Petitioner in regard to his defective delinquency status, he too was without testimony in his own case to rely upon in this Court. However, testimony had been presented at judicial proceedings involving other Patuxent inmates; that testimony had been subject to confrontation and cross-examination, and it had been formally admitted into evidence. Therefore, both Petitioner and Respondent are properly free to rely upon this testimony in the instant case—and both have done so.

In a similar case in which one side attempted to gild its case at the last moment by filing original evidence in this Court, the Court struck not only those belated documents but also all portions of the brief based thereon. *Lawn v. United States*, 355 U.S. 339, 354 (1958). The same relief should be granted here, and we respectfully request that Respondent be admonished not to refer in oral argument to this blatantly improper hearsay "evidence."

II. The State's Brief

Substantial portions of the State's brief are devoted to aspects of the Patuxent Institution and the Maryland Defective Delinquency statute which are interesting but totally unrelated to McNeil for the simple reason that he has never received the benefits of the diagnosis, judicial hearing and treatment which the State discusses.[2]

We will reply briefly, however, to several points which at least involve this case.

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[2] For example, the State favorably contrasts (pp. 13-18) the Patuxent diagnostic techniques with those in other jurisdictions; discusses (pp. 18-21) the thoroughness of Patuxent's medical procedures and the high expenditures per inmate for diagnosis and treatment; presents (pp. 28-29) miscellaneous statistics about "quartile rankings" of Patuxent inmates on the basis of the length of their sentence; describes (pp. 33-35) the procedural safeguards available under the Maryland statute before one can be classified after hearing as a defective delinquent, and recounts (pp. 8-13) the careful consideration given by the Maryland Legislature to the general problems posed by mentally defective criminals.

The State also claims (pp. 13-15) that the Maryland Code, unlike other federal and state statutes, provides for a diagnosis by a psychiatrist, a psychologist, and a medical doctor, rather than by two psychiatrists or physicians. This fact has nothing whatever to do with this case, since McNeil has never been diagnosed.

1. The State relies (p. 45 n. 10) on Ind. Ann. Stat. 9-3404 for the proposition that a suspected sexual psychopath must answer questions asked by psychiatrists to determine whether or not he is a sexual psychopath under penalty of contempt of court. The State seeks to analogize that statute to the Maryland Code. Although the State tells us that the Indiana statute is "now repealed", it fails to disclose that the statute was repealed because the procedure authorized by it was found to violate the Fifth Amendment privilege against self-incrimination. See *Haskett v. State*, 263 N.E.2d 529 (Ind. 1970). Thus, the prior Indiana and the present Maryland practices are indeed analogous and are both unconstitutional. The State also relies (p. 52) on *State ex rel. Haskett v. Marion County Criminal Court*, 250 Ind. 229, 234 N.E.2d 636, *cert. denied*, 393 U.S. 888 (1968), for the proposition that the "compulsory examination of an accused in a sexual psychopathy action by two physicians" does not violate the privilege against self-incrimination. However, that decision was overruled two years later in *Haskett v. State, supra*.

2. The State claims (p. 26) that the ex parte letter from the Director of Patuxent to the Baltimore City Criminal Court (see Ptr's Brief p. 11) was sent because the Act requires that a report be made to the court within six months of the inmate's arrival, and if diagnosis has not been completed by then, the court is "routinely" notified. The State asserts that the ex parte letter was not sent "in response to" McNeil's letter to the District Court "at or about the same time." Of course, if the letter sent by Patuxent was in fact in response to a statutory demand, it is extraordinary that the letter would be sent surreptitiously, with no notice to McNeil or his counsel. But even more to the point, the sequence of events involved clearly refutes the State's position:

—McNeil arrived at Patuxent on August 10, 1966.
—The six-month period expired on February 10, 1967.

—Over three months later, on May 15, 1967, in the absence of any action by Patuxent, McNeil wrote to the District Court.

—On May 23, 1967, eight days after the mail censor at Patuxent recorded in McNeil's file that he had written the District Court, the Director of Patuxent wrote his "routine" letter to the Baltimore City court.

3. The State claims (pp. 54-55):

> * * * the Maryland Courts, in construing Art. 31B, have held that results of [Patuxent] examinations could probably not be introduced [into evidence in a subsequent criminal trial] without a violation of *Miranda v. Arizona* * * *. In so stating, the Maryland Courts have built an additional barrier against incrimination which is not present in other jurisdictions, which have held that the results of psychiatric tests do not fall within the ambit of *Miranda*.* * *

To the contrary, the court in the case[3] cited by the State to support this claim never reached the *Miranda* issue because that issue had not been raised in the trial court, and in fact suggested in dictum that the *Miranda* warnings probably would *not* have to be given at the Patuxent examinations.

4. The State indicates (p. 65) that an undiagnosed inmate may receive a judicial hearing if the Patuxent staff "feels that there is enough on the record to support the presence or absence of defective delinquency* * *." This is a blatantly incorrect statement. In fact, Patuxent continues in every case—as in this one—to refuse voluntarily to supply the Maryland courts with any data on an inmate who refuses to submit to its psychiatric examinations. It was only when ordered to do so by a Maryland court that in at least one instance Patuxent provided information and a recommendation on the basis of which the court could determine possible status as a defective delinquent (see Ptr's Brief, pp. 24-27).

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[3] *Wise v. Director*, 1 Md. App. 418, 230 A2d 692 (1967), *cert. denied sub nom. Wise v. Boslow*, 390 U.S. 1030 (1968).

5. The State's gloomy warning (p. 67) that the result of granting McNeil a hearing after six years of confinement "will be the frustration of every sexual psychopath statute in the country and chaos in the determination of insanity in criminal cases" has no substance. The Supreme Court of Indiana held two years ago that the privilege against self-incrimination entitles a suspected sexual psychopath to refuse to answer questions at a psychiatric interview conducted to determine whether he is a sexual psychopath. *Haskett v. State*, 263 N.E.2d 529 (Ind. 1970). Other state courts have held that the privilege applies at pretrial psychiatric examinations (see Ptr's Brief p. 52 n. 61), and no frustration, chaos or even confusion has resulted.

6. The State says (p. 78) it is "confident that there is a basis in fact for concluding that non-cooperators are, more probably than not, defective delinquents." Needless to say, the State does not provide a shred of evidence for this speculative presumption. However, since the State appears confident that "there is a basis in fact" for treating inmates who refuse to submit to its psychiatric examinations as defective delinquents, it is totally inexplicable that Patuxent consistently refuses to make such a recommendation to the court. Indeed, it should be emphasized again that it is the court (or a jury) which determines, after hearing, an inmate's status as a defective delinquent—not Patuxent.

7. The very cases cited by the State (p. 56) to justify indefinite civil commitment illustrate that there must be a full hearing prior to such commitment. For example, the state statute allowing commitment of persons exhibiting "psychopathic personality" involved in *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270 (1940), as this Court carefully pointed out, required a hearing before commitment. The full hearing required by the federal statute involved in *Greenwood v. United States*, 350 U.S. 366 (1956), is discussed at pages 21-22 of Petitioner's brief. The State cites 123 cases in its brief and yet fails to cite the one case most precisely in point, which holds that absent a full hearing, the State has no right to indefinite commitment

of predicted offenders, whether its confinement procedures are denominated civil or criminal. *Specht v. Patterson*, 386 U.S. 605 (1967).

8. In response to McNeil's equal protection argument, the State answers (pp. 56-58) that it may treat defective delinquents as a recognized class of offenders. Once again, the State ignores the fact that McNeil has never been classified as a defective delinquent, so that he benefits neither from the treatment facilities at Patuxent nor the treatment facilities available to other convicted prisoners who have not been found to be defective delinquents. Further, Patuxent's submission of a diagnostic report on at least one inmate (McKenzie), while it refuses to supply the court with one iota of information on McNeil, constitutes a second violation of equal protection guarantees.

9. The State's concession (p. 58) that at least "orderly expedition", even if not "mere speed", lies at the heart of proper administration of justice stands in stark contrast to its treatment of McNeil. As to McNeil, *after six years* of confinement the State still refuses to submit to the Maryland courts the relevant data it has concerning him, including its observation of him during all that time. By no conceivable means can the State's studied inaction be described as "orderly expedition." It is incredible that the State advances as a reason for this inaction the fact that "therapeutic treatment of mental illness may take a considerable period of time" when it has deprived McNeil of all such treatment.

10. In several places in its Brief (*e.g.*, pp. 55, 51 n. 14), the State claims that McNeil's self-incrimination arguments should be rejected because McNeil, for whom counsel was appointed by this Court on January 24, 1972, has been unable to document any instances in which incriminatory information gathered at diagnostic interviews was used in subsequent criminal proceedings. This Court, of course, has never required such documentation as a prerequisite to sustaining a claim of violation of the privilege against self-incrimination. Instead, the Court has concerned itself with

the dangers of self-incrimination inherent in answering the State's questions and the degree to which State prosecutorial authorities have access to that information. Moreover, it would be virtually impossible for one defendant to prove the extent to which such information had formed a link in the chain of evidence used to convict other defendants.

11. The State says (p. 30) that "the findings of the courts subsequent to *Sas* * * * have held that therapy is available to all at Patuxent Institution and that confinement without treatment would be patently unconstitutional." We agree. McNeil has been confined at Patuxent for six years without treatment. We challenge the State to contradict that statement.

12. The State claims (p. 13) greater safeguards under Maryland law than under federal law. This is simply incorrect. Federal law requires that a *full judicial hearing* be held if a federal prisoner is to be confined after the expiration of his criminal sentence due to any form of mental defectiveness (Ptr's Brief, pp. 21-22).[4]

13. All of the cases cited by the State (pp. 42-45) to support its assertion that the privilege against self-incrimination may not be claimed at a psychiatric examination involved pretrial psychiatric examinations in which the defendant was attempting simultaneously to make use of expert testimony by his own psychiatrists that he was insane while seeking to deny the state the opportunity to have its own experts make similar examinations. On that basis, these courts held that the privilege had been waived. Obviously, no such situation exists here.[5]

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[4] The same requirement is also contained in the New Jersey statutory procedures cited by the State at page 14 of its brief. *See State v. Lee*, 60 N.J. 53, 286 A.2d 52 (1972). *See also* the Connecticut statutory procedures cited in Petitioner's brief (p. 21 n. 26).

[5] The sharp contrast between that situation and the instant case is illustrated by two decisions reached by the Supreme Court of New Jersey. In *State v. Whitlow*, 45 N.J. 3, 210 A.2d 763 (1965), the court held that the defendant had waived his privilege against self-incrim-

(Cont'd.)

14. The State's discussion (pp. 39-40) of *Jennings v. Mahoney*, 404 U.S. 25 (1971), is disingenuous at best. In language not quoted by the State, this Court said that "there is plainly a substantial question whether the Utah statutory scheme on its face affords the procedural due process required by *Bell v. Burson* [402 U.S. 535 (1971)]." *Id.* at 26. The Court did not have to strike down the statute, however, since the attempted suspension of the petitioner's license had been stayed while he was given a full hearing. McNeil's six-year confinement at Patuxent can hardly be compared to suspension of a license to drive a car. Even prior to expiration of McNeil's criminal sentence, more than a change in the place of confinement was involved. Not only did his referral to Patuxent raise the "obvious but terrifying possibility" that he would be "marooned and forsaken" with mentally ill persons even though he was not,[6] but he has been denied treatment which would have been available had he served his sentence at Hagerstown. The State cannot impose these harmful consequences without a judicial hearing. *Kent v. United States*, 383 U.S. 541 (1966); *Bell v. Burson, supra; Jennings v. Mahoney, supra.*

15. The State seeks (p. 27) to excuse the delay of over two years between Patuxent's third and fourth formal requests that McNeil submit to the State's examinations by claiming, without a record citation, that it made "informal contacts" with McNeil to determine whether he wished to be examined. Not only must this contention be disregarded because unsupported by a record citation (Rule 40(2)), but

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ination at the psychiatric interview by raising the defense of insanity. However, three years later, in *State v. Obstein*, 52 N.J. 516, 247 A.2d 5 (1968), the same court held that the state could *not* require a defendant to submit to a pretrial psychiatric examination where he did not wish to raise an insanity defense at trial. Thus, it is *Obstein*—not *Whitlow*—which presented facts analogous to those here.

[6] *United States ex rel. Schuster v. Herold*, 410 F.2d 1071, 1078-79 (2d Cir.), *cert. denied*, 396 U.S. 847 (1969).

it is in direct contradiction to the procedure outlined by the Chief Psychologist at Patuxent (see Ptr's Brief, p. 11).

16. The State's claim (p. 41) that personal disclosures as to one's mental condition are not testimonial under the Fifth Amendment is incorrect both factually and legally and is rejected by much of the language in *State v. Whitlow, supra,* upon which the State relies (pp. 43, 53). The so-called "mental condition" that Patuxent is attempting to compel the inmate to disclose is perhaps best summed up by Dr. Harvey Kelman, staff psychiatrist at Patuxent, testifying in the *McKenzie* case (see Ptr's Brief, pp. 24-27):

> Now, I need to talk to an individual with regard to their part of the [statutory] definition [of defective delinquency] for several reasons. Although it is true that I have available to me records showing criminal convictions of the patients at the institution, I have no idea of his version or his explanation of what occurred in those cases. * * *
>
> [W]ith regard to that part of the definition the patient may wish to volunteer other information which would lend weight towards or against his having committed other antisocial acts or not committed other antisocial acts, which may not have been tried, may not appear in the record, may not appear on the FBI report, but nevertheless would be important to lending substance either for or against this part of the definition. * * *
>
> [I]n considering that part of the definition I am asked to consider not only criminal convictions that occur on the record and with the record from the FBI or from the courts, as I understand it, but to consider the matter which the law calls antisocial behavior. Now, this behavior may be of numerous varieties. I have no way of knowing the presence or absence of this behavior that may never come to note in anybody's records unless I talk with the patient about it. [Tr. 28-29.]

When this testimony is combined with what the Fourth Circuit said in the *Sas* case about the use that can be made of the

information extracted from the inmate,[7] any attempt to equate this information with blood tests or other non-testimonial disclosures is reduced to vapor.

17. Finally, the State presents (p. 32) to this Court a truly frightening argument:

> The State's right to compel cooperation is based upon the State's need for diagnosis. If the State has a right, it cannot be without means of vindicating it. The means chosen—an indeterminate stay in the diagnostic area of Patuxent until cooperation is obtained—is a necessary and proper means to defeat the desire of undiagnosed defective delinquents to evade treatment by sitting out their sentences.

This is one of the most Orwellian arguments that counsel for Petitioner has ever encountered. Note the assumptions:

—that all those referred to Patuxent are "undiagnosed defective delinquents";

—that the State has a "right" to "compel cooperation";

—that the refusal of cooperation must result from a "desire * * * to evade treatment * * * ", and

—that the inmate's refusal of "cooperation" leads, without any intermediate steps (such as a hearing or

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[7] "The institutional experts who testify for the state are not in a patient-physician relationship with the criminal and may testify as to matters learned from the criminal in interviews and tests, even if the same concerns prior criminal offenses and convictions and admissions of prior antisocial conduct. Simmons v. Director, 227 Md. 661, 177 A.2d 409 (1962); McDonough v. Director, 229 Md. 626, 183 A.2d 368 (1962); * * *. Extensive hearsay regarding the past social, physical, mental and psychiatric and criminal condition and history is admitted at the hearing over objection, since it is deemed that the Act requires the introduction of the same and that the purpose of the law would be defeated unless evidence of antecedent conduct is presented upon which to establish the propensity toward criminal activity. Simmons v. Director, supra; Fairbanks v. Director, 226 Md. 661, 173 A.2d 913 (1961)." *Sas v. Maryland*, 334 F.2d 506, 511 (4th Cir. 1964).

judicial order), to "an indeterminate stay in the diagnostic area" – in other words, for life.

It does not seem to occur to the State that someone referred to Patuxent may *not* be a defective delinquent, with a concomitant right *not* to be treated by the State but instead to serve his debt to society in a regular correctional facility. Nor does it seem to occur to the State that one of its inmates might have a perfectly legitimate, well-founded, and even compelling reason for refusing to "cooperate". And most importantly, it does not seem to occur to the State that the courts, not the staff of a State institution, sentence citizens to confinement for life in this country, and that the Constitution also plays its part.

Respectfully submitted,

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